Supreme Court, U.S.
FILED
OCT 21 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-476

In The
Supreme Court of the United States
October Term, 1987

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Petitioner,

v.

OCEAN CITY POLICE DEPARTMENT,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

JAMES P. GARLAND
Counsel of Record

RICHARD T. SAMPSON
ANTHONY W. KRAUS
KATHLEEN PONTONE
SHARON REYNOLDS STANTON

SEMMES, BOWEN & SEMMES
1025 Connecticut Avenue, N.W.
Suite 500
Washington, D.C. 20036
(202) 822-8250

Attorneys for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

QUESTION PRESENTED FOR REVIEW

Whether the court of appeals properly declined to enforce a subpoena issued by the Equal Employment Opportunity Commission when the charge that allegedly formed the basis for the Commission's jurisdiction was filed 251 days after the alleged act of discrimination and the charge was never referred to a local antidiscrimination agency for processing, but, rather, had been sent by the Commission to such an agency merely for informational purposes.

LIST OF PARTIES

Pursuant to Rules 21.1(b) and 28.1, Respondent states that the following parties appeared in the United States Court of Appeals for the Fourth Circuit:

Equal Employment Opportunity Commission: an agency of the United States Government with no corporate affiliates; and

Ocean City Police Department: an agency of the Town of Ocean City, Maryland, which has no corporate affiliates.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	2
REASONS WHY THE PETITION SHOULD BE DENIED	6
I. THIS CASE INVOLVES UNIQUE CIRCUMSTANCES NOT PRESENT IN THE *DIXON* DECISION AND DOES NOT PRESENT A PRESSING ISSUE FOR REVIEW	6
II. THERE IS NO CONFLICT AMONG THE CIRCUITS	10
III. REVIEW BY THIS COURT IS NEITHER APPROPRIATE NOR NECESSARY	11
CONCLUSION	13
APPENDIX	App. 1

TABLE OF AUTHORITIES

CASES:

Page

Dixon v. Westinghouse Electric Corp., 787 F.2d 943 (4th Cir. 1986), *cert. pending* 55 U.S.L.W. 3115 (August 19, 1987) 5, 6, 7, 8, 11, 12

Isaac v. Harvard University, 769 F.2d 817 (1st Cir. 1985) 10

Mohasco Corp. v. Silver, 447 U.S. 807 (1980) 11

STATUTES:

The Civil Rights Act of 1964, Title VII

42 U.S.C. § 2000e-5(c) 706(c) 2, 3, 10

42 U.S.C. § 2000e-5(e) 706(e) 2, 5, 6, 10

Art. 49B, Human Relations Commission, Section 9, MD. ANN. CODE (1986 Replacement Volume) 3

No. 87-476

In The
Supreme Court of the United States
October Term, 1987

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Petitioner,

v.

OCEAN CITY POLICE DEPARTMENT,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Ocean City Police Department ("OCPD"), respectfully requests that this Court deny the Solicitor General's petition on behalf of the Equal Employment Opportunity Commisison ("EEOC"), seeking a writ of certiorari for review of the Fourth Circuit's decision in this case.[1]

[1] Those sections of the Solicitor General's petition citing the opinions below, the basis for this Court's jurisdiction, and the statutory and regulatory provisions involved are adopted by reference.

STATEMENT OF THE CASE

At issue in this case is whether EEOC's mailing of an employment discrimination charge to a state antidiscrimination agency that had previously waived the right to process it, extends the deadline for the filing of that charge with EEOC from 180 to 300 days. The United States Court of Appeals for the Fourth Circuit concluded that under Section 706(e) of Title VII, 42 U.S.C. § 2000e-5(e), such a charge is subject to the shorter, 180-day deadline. Accordingly, it held the charge in this case to be untimely, and refused to enforce an EEOC subpoena based upon it.

The charge was filed by Keith Wright ("Wright"), a black former police officer with the Police Department of Ocean City, Maryland ("OCPD"). Wright claimed that OCPD discharged him because of his race on April 14, 1981. Wright filled out an EEOC charge form on December 16, 1981, which he filed by mail. It was received by the Commission's Baltimore District Office on December 21, 1981, two hundred fifty-one days after his termination.

Maryland has created a state antidiscrimination agency—the Maryland Commission on Human Relations ("MCHR")—which is empowered to remedy racially discriminatory dicharges from employment that occur in Maryland. MCHR is recognized by EEOC as a so-called "deferral" agency. Under Section 706(c) of Title VII, 42 U.S.C. § 2000e-5(c), charges alleging employment discrimination in Maryland must be filed with MCHR, and it must be given 60 days to resolve them, prior to the filing of any such charge with EEOC under Title VII.

On February 10, 1981, ten months prior to the filing of Wright's charge with EEOC, MCHR had entered into a so-called work-sharing agreement with EEOC. This agreement was intended to reduce duplication of effort by MCHR and EEOC with respect to charges cognizable by both agencies. The agreement provided that EEOC would take responsibility for all charges originally received by it. The agreement also provided that EEOC would take primary responsibility for processing of all charges covered under Title VII received by EEOC more than 180 days but less than 300 days after the alleged violations.[2] (C.A. App. at 111-118).

EEOC contends that pursuant to Title VII's "deferral" requirements in Section 706(c), it mailed a copy of Wright's Title VII charge to MCHR on December 22, 1981.[3] It further contends that it also mailed a Form 212-A with the charge. This form purportedly was executed by EEOC to indicate that under the work-sharing agreement with MCHR, EEOC would "initially process" the charge (App. at 2).

Form 212-A also contains check-off boxes, for use by the local agency to inform EEOC of its intentions. The local agency can either (1) simply acknowledge receipt of

---

[2] Such charges, as was Wright's, are untimely under Maryland's employment discrimination law, which provides a six month limitation period. MD. CODE ANN., Art. 49B, Section 9 (1986 Repl. Vol.).

[3] EEOC made these contentions in a supplemental affidavit by the District Director of EEOC's Baltimore District Office. The affidavit is contained at C.A. App. 148 and reprinted in the appendix to this brief, which is cited as "App."

the charge, (2) state that it will process the charge and that EEOC should refrain from doing so, or (3) state that it will not process the charge. EEOC alleges that the Form 212-A sent with Wright's charge was mailed back to it by MCHR without any of these boxes being checked off. An affidavit filed by the Director of EEOC's Baltimore District Office states that EEOC regarded the lack of acknowledgement by MCHR as inadvertent and inconsequential (App. at 3). According to the District Director, the "Form 212 * * * is simply a 'record-keeping' form for use of the agencies." (*Id.*) In the Commission's view, execution of the form by the local agency "is not material to the processing of the charge" because the work-sharing agreement specifies already which agency is to process which charges. (*Id.*) Under that agreement the MCHR had agreed to take no action on Wright's charge because EEOC received it first, and because it was filed over 180 days after his discharge.

On December 6, 1983, nearly two years after EEOC received Wright's charge, the Commission issued a subpoena *duces tecum* to OCPD requesting the production of certain documents allegedly necessary to its investigation of Wright's claims. After unsuccessfully petitioning to revoke or modify the subpoena, OCPD continued to decline to comply. EEOC filed an application for enforcement with the United States District Court for the District of Maryland on December 7, 1984. On December 10, 1984, the district court ordered OCPD to show cause why it should not be required to comply with the subpoena. A non-evidentiary hearing was held on the record on June 7, 1985. (C.A. App. 119-20).

On June 30, 1985, the district court granted EEOC's application for enforcement of its subpoena. On July 8, OCPD appealed the district court's enforcement order, and on August 12, 1985, the district court stayed that order pending the outcome on appeal.

On April 10, 1986, a divided panel of the United States Court of Appeals for the Fourth Circuit affirmed the district court's enforcement order, holding that the timeliness of the charge was not an issue which properly could be considered by the district court in a subpoena enforcement proceeding. The panel majority, however, also determined that the charge was untimely under the court's reasoning in *Dixon v. Westinghouse Electric Corp.*, 787 F.2d 943 (4th Cir. 1986), *cert. pending* 55 U.S.L.W. 3115 (August 19, 1987). In *Dixon*, the court had concluded that when MCHR declines to process a charge pursuant to its work-sharing agreement with EEOC, no proceedings have been "initially instituted" with an "agency with authority to grant or seek relief from such practice." Under Section 706(e) of Title VII, 42 U.S.C. Section 2000e-5(e), the charging party in such a case therefore has only 180, rather than 300 days to file a Title VII charge based on the same alleged act of discrimination.

Circuit Judge Widener concurred with the panel majority's determination that Wright's charge was untimely, but dissented from the majority's decision to enforce the subpoena. He concluded that Title VII does not give EEOC investigatory authority over a charge which the entire panel agreed was untimely.

Following a rehearing on June 24, 1987, the court *en banc* reversed the panel, finding that the timeliness of an

underlying charge properly could be considered in a subpoena enforcement proceeding and that when the charge is untimely, the subpoena should not be enforced.

———o———

REASONS WHY THE PETITION SHOULD BE DENIED

I. THIS CASE INVOLVES UNIQUE CIRCUMSTANCES NOT PRESENT IN THE DIXON DECISION AND DOES NOT PRESENT A PRESSING ISSUE FOR REVIEW

The Solicitor General's petition characterizes this case as involving facts "nearly identical" to those in *Dixon v. Westinghouse*, 787 F.2d 943 (4th Cir. 1986) *cert. pending* 55 U.S.L.W. 3115 (August 19, 1987), and incorporates by reference his amicus brief in support of the certiorari petition in *Dixon*. Pet. at 6-7.[4] Assuming arguendo that this case were indistinguishable from *Dixon*, it would not be a proper case for review for the same reason that *Dixon* is not. The work-sharing agreement between EEOC and MCHR expressly provides that MCHR will not process charges such as that filed by Wright and Dixon but will defer to EEOC (C.A. App. 118). Accordingly, EEOC's mailing of such charges to MCHR does not constitute "initially institut[ing] proceedings with a state or local agency with authority to grant or seek relief from such practice," as required under Section 706(e) of Title VII:

---

[4] The Solicitor General's petition for a writ of certiorari in this case is cited as "Pet.". His amicus brief in support of the petition for a writ of certiorari in *Dixon* is cited as "Am.Br."

> A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred . . . except that in the case of an unlawful employment practice with respect to which the person aggrieved has *initially instituted* proceedings with a State or local agency *with authority to grant or seek relief from such practice* . . . such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred***

(Emphasis added). Because the language of the statute is clear and unambiguous, there is no need for clarification of its requirements by this Court.[5]

Even more significant, however, is the fact that this case is not "nearly identical" to *Dixon*, contrary to the Solicitor General's representation. The Solicitor General concedes by footnote that "*Dixon* more neatly presents the timeliness issue" on which review is sought. Pet. at 6, n. 6. OCPD submits that it is precisely those facts which disrupt the "neat presentation" of the timeliness issue raised by the Solicitor General that warrant denial of his petition.

In *Dixon*, EEOC had mailed Dixon's Title VII charge, along with Form 212-A, to MCHR, just as it did with Wright's charge in this case. In *Dixon*, however, MCHR had checked off the box on the Form 212-A sent with

---

[5] In the rehearing of this case *en banc*, EEOC tried to induce the Fourth Circuit to reconsider and reverse the panel decision in *Dixon*. In the court's decision after the *en banc* rehearing, *Dixon* was reaffirmed and none of the eleven judges who participated expressed any doubt about its accuracy. *EEOC v. Ocean City Police Dept.*, 820 F.2d 1378, 1380 n.3 (4th Cir. 1987).

Dixon's charge, indicating that MCHR "will not process the charge." In contrast, MCHR did not check off any of the boxes on the Form 212-A that accompanied Wright's charge, but rather, returned it unexecuted. Subsequently, the District Director of EEOC's Baltimore office filed an affidavit in this case, characterizing the Form 212-A exchange as merely for "record-keeping." Her affidavit further represented that no response by the MCHR was necessary on the Form 212-A, because the election by MCHR of which charges to process already had been made by it in the work-sharing agreement:

> MCHR apparently through inadvertence and oversight, failed to place a checkmark on the appropriate line to indicate acknowledgment of the charge and the fact that the Commission would initially process it. However, such an oversight *is not material to the processing of the charge* as the work-sharing agreement between the agencies clearly controls which charges are to be initially processed by the Commission and which are not.

(App. at 3; emphasis added).

These concessions vitiate the Solicitor General's timeliness argument that he presses before this Court in *Dixon*, and by reference, in this case. The Solicitor General takes issue with the Fourth Circuit's determination that EEOC's mailing of the Title VII charges to MCHR did not constitute "initially institut[ing] proceedings" before a Section 706 deferral agency. Am. Br. at 9. The Solicitor General's argument in *Dixon* is that the exchange of Form 212 A between EEOC and MCHR did constitute an "institution of proceedings" sufficient to trigger the 300-day limitations period for filing Title VII charges:

> In this case, pursuant to the work-sharing agreement, the EEOC transmitted a copy of the charge to the MCHR, *which in turn formally notified both the EEOC and petitioner that it was terminating its proceedings and that the EEOC would handle the charge. Contrary to the court of appeals' characterization (Pet. App. 52), that exchange was not merely for "informational purposes."* Under the work-sharing agreement, the MCHR expressly reserved the right to assert an interest in processing a charge to which the agreement generally waived the MCHR's exclusive rights and generally assigned the EEOC primary responsibility (C.A. App. 84).
>
> * * *
>
> State agency proceedings have been "initially instituted," within the meaning of Section 706(e), even if immediately upon receipt of a copy of a charge from the EEOC, the state agency notifies the EEOC that it waives its right of exclusive processing and is terminating its proceeding.

Am. Br. at 9-10 (emphasis added).

Whatever dubious basis may be wrested from the *Dixon* record on which to characterize the exchange between EEOC and MCHR as "instituting proceedings", there is none whatever in this case. The affidavit of EEOC's Baltimore District Director constitutes a binding admission by EEOC that the Form 212-A sent with the Wright charge was purely for "record-keeping" and that MCHR's failure to execute it was irrelevant because the work-sharing agreement controlled. This concession, which is peculiar to this case, precludes any conceivable argument that proceedings of any sort were "initially instituted" before MCHR by EEOC's mailing Wright's charge to that agency. MCHR took no action at all with respect

to Wright's charge, including even acknowledging it, and EEOC admitted that no such action was expected or "material".

On this record, the inapplicability to Wright of the extended 300-day filing deadline is therefore beyond dispute. No arguable error in the result below has been demonstrated by the Solicitor General, which would justify review by this Court. In any event, the review of the court of appeals' holding would embroil this Court in considering the implications of Section 706(e) of Title VII on this unusual record with its unique admissions by EEOC. The involvement by this Court in such a fact-specific controversy would be wasteful of its limited certiorari jurisdiction.

II. THERE IS NO CONFLICT AMONG THE CIRCUITS

In his amicus brief in support of the petition in *Dixon*, the Solicitor General cites one principal decision that he contends is in conflict with *Dixon* and the decision below: *Isaac v. Harvard University*, 769 F.2d 817 (1st Cir. 1985). *Isaac* addressed the issue of when proceedings "terminate" before a local agency for purposes of meeting the deferral requirements of Section 706(c). There was no question raised in *Isaac* concerning what constitutes the "initial instituting of proceedings" under Section 706(e) in these circumstances, nor had the local agency made any advance waiver under a work-sharing agreement of its right to process such a claim. Additionally, the First Circuit made no finding on the issue in this case by necessary implication.

III. REVIEW BY THIS COURT IS NEITHER APPROPRIATE OR NECESSARY

In his amicus brief in *Dixon,* as incorporated in his petition in this case, the Solicitor General concludes with *in terrorem* predictions of the consequences of bypassing review of the *Dixon* issue. He contends that EEOC may be required to revise its work-sharing agreements and related regulations and to implement a less efficient charge processing procedure. He also contends that the timeliness of thousands of charges filed with EEOC beyond the 180-day limitations period will be placed in doubt without clarification by this Court.

The dire consequences that EEOC predicts will result from denying review in either *Dixon* or this case are illusory. Any possible need to revise EEOC's work-sharing agreements and regulations would, at worst, necessitate reversion to those procedures utilized prior to 1981 to coordinate EEOC's operations with state and local deferral agencies. The resultant impact on equal employment opportunity administration reasonably could be expected to be minimal.

Alternatively, the alleged "doubt" that EEOC contends will be cast on pending EEOC charges filed after the 180-day limitations period is only significant to the extent that charging parties reasonably may have relied on the longer 300-day deadline. In *Mohasco Corp. v. Silver,* 447 U.S. 807 (1980), this Court succinctly rejected any such concern, noting that lay people were more likely to construe Title VII as generally providing a 180-day deadline:

> The unfairness argument is based on the assumption that a lay person reading the statute would assume

> that he had 300 days in which to file his first complaint with either a state or federal agency. We find no merit in this argument. We believe that a lay person *would be more apt to regard the general obligation of filing within 180 days as the standard of diligence* he must satisfy, and that one who carefully read the entire section would understand it to mean exactly what it says.

447 U.S. at 825 (emphasis added). An EEOC regulation adopting a contrary statutory interpretation was held to be inconsequential. *Id.*

The Solicitor General concludes his petition not with a request that certiorari be granted, but instead, by asking that this case be held in abeyance pending a decision in *Dixon*. His request is obviously not for certiorari in this case, but rather, for a limbo status. That request contradicts his assertion that this case raises important issues worthy of this Court's review. If, despite OCPD's arguments, this case is deemed to be appropriate for review, it should be consolidated with *Dixon* and reviewed as a companion case, so that the Court may consider the issues in light of the facts developed in this case. If, however, this case is not appropriate for review on its own unique facts, certiorari should be denied.

———o———

CONCLUSION

For the foregoing reasons, the Solicitor General's petition for a writ of certiorari should be denied.

Respectfully submitted,

JAMES P. GARLAND
Counsel of Record

RICHARD T. SAMPSON
ANTHONY W. KRAUS
KATHLEEN PONTONE
SHARON REYNOLDS STANTON

SEMMES, BOWEN & SEMMES
1025 Connecticut Avenue, N.W.
Suite 500
Washington, D.C. 20036
(202) 822-8250

Attorneys for Respondent

October 1987

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Applicant,	)	
v.	)	CIVIL ACTION NO.: K-84-4448
OCEAN CITY POLICE DEPARTMENT, Respondent.	)	

SUPPLEMENTAL AFFIDAVIT OF
DOROTHY E. MEAD

I, Dorothy E. Mead, being duly sworn, hereby depose and state as follows:

1. I am the Director of the Baltimore District Office of the Equal Employment Opportunity Commission ("Commission"), and, as such, I am the custodian of the Commission's investigative files in this office.

2. I make this supplemental affidavit on the basis of my own personal knowledge and my review of the Commission's investigative files entitled *Keith Wright v. Ocean City Police Department*, Charge No. 033-82-0502, and my experience with and knowledge of the Commission's rules, regulations, and practices.

3. On November 19, 1981, Keith Wright came to the Commission's Baltimore District office to file a charge under Title VII against the Ocean City Police Department

("Respondent"). On that date he completed EEOC Form 283 entitled Intake Questionnaire. As indicated in my initial affidavit in this matter dated December 3, 1984, the information provided by Mr. Wright in the Intake Questionnaire was sufficient to constitute a charge for timeliness purposes under section 1601.12(b) of the Commission's Rules and Regulations, 29 C.F.R. § 1601.12(b).

4. Mr. Wright's charge was "perfected" for service by placing the information provided by him on EEOC Form 5B and signed by Mr. Wright on December 16, 1981. Subsequently, on December 22, 1981, the perfected charge was mailed to the Maryland Commission on Human Relations ("MCHR"). Attached to the charge was EEOC Form 212-A ("Charge Transmittal") within which the Commission notified MCHR that pursuant to the worksharing agreement between the Commission and the MCHR, the Commission would initially process the *Wright* charge. Attached hereto as Mead Supplemental Exhibit "1" is the Form 212 referred to in this paragraph.

5. Under the record-keeping procedure adopted by this office and the MCHR with respect to charges of discrimination initially filed with the Commission, the MCHR, upon receipt of a Form 212, acknowledges receipt of the document by doing three things: First, it places a checkmark on the appropriate line in the bottom half of the form (under the words "To Whom It May Concern"). Second, it places the date and number which it assigns to the charge on the lower left-hand corner of the form; and third, it returns the completed form to the Commission.

6. Pursuant to the record-keeping procedures outlined in paragraph 5, the MCHR acknowledged receipt of the Form 212 and a copy of the *Wright* charge on January 19, 1982. A copy of the Form 212 received from the MCHR is attached as Mead Supplemental Exhibit "2". It is noted that the MCHR apparently through inadvertence and oversight, failed to place a check-mark on the apppropriate line to indicate acknowledgement of the charge and the fact that the Commission would initially process it. However, such an oversight is not *material* to the processing of the charge as the worksharing agreement between the agencies clearly controls which charges are to be initially processed by the Commission and which are not. The Form 212 on the other hand is simply a "record-keeping" form for the use of the agencies.

7. Further, affiant sayeth not.

/s/ DOROTHY E. MEAD
District Director
Baltimore District Office
Equal Employment Opportunity
Commission

Subscribed and sworn to before me this 23rd day of July, 1985.

/s/ Lawrence E. Carter
Notary Public

My Commission expires: July 1, 1986.